CORRESPONDENCE/MEMORANDUM

State of Wisconsin

WISCONSIN DEPT. OF NATURAL RESOURCES

DATE: November 1, 2004

TO: NR 115 Advisory Committee Members

FROM: Carmen Wagner, WT/2

SUBJECT: Comments and Responses from Second Draft of Changes to Ch. NR 115, Wis. Admin. Code

The summary provided below includes comments received from advisory committee members at the August advisory committee meeting, as well written comments provided by advisory committee members after the meeting. The comments have been separated out by sections in the proposed rule, and have been condensed to avoid repetition. A response to the comments is provided to explain how the second draft was changed to produce the third draft as a result of the comments or why a change was not made. This document does not capture or address all the changes between the second and third drafts, because in some instances a change between drafts had cascading effects that required additional changes.

Sections

NR 115.01 Purpose

C1: Rather than having an individual purpose section in each section, could they be consolidated into this section?

R: Due to the importance of the purpose of a zoning restriction in the determination of whether or not unnecessary hardship exists in a variance case, the purpose subsection has been retained in each section, but the language has been shortened considerably.

C2: Subsection (4) should be shortened to state that local regulations may exceed the standards in this chapter.

R: The language was changed from "are encouraged to" to "may need to", and the language at the end of the subsection was deleted.

C3: Encouraging counties to adopt more restrictive standards (rather than simply allowing them to do so) is a huge policy change that we have not discussed as an Advisory Group, let alone reached consensus on. The decision by counties to adopt more restrictive standards should be left up to each individual county based upon their individual needs and objectives, without encouragement, explicit or implicit, from the state's shoreland zoning regulations. The word "encourage" should be changed back to "may."

R: Please refer to the response for Comment 2.

C4: Subsection (4) should be redrafted in light of *Ziervogel.* In that case, the Supreme Court struck down a county shoreland zoning ordinance that eliminates that which the statute allows (a variance standard). At a minimum, this section should be shortened to state that local regulations may vary from the standards in this chapter but may not prohibit what is allowed by statute. Editorializing about the relative merits of lighting or waterway classification will lead to more conflict and should not be included in the rule.

R: When referencing statutory requirements, the term "shall" was used to indicate that counties must allow that which a statute allows. Language regarding lighting ordinances was struck and the reference to waterway classification systems was retained as an example.

NR 115.02 Applicability

C5: In subsection (2), the term "town shoreland zoning ordinance" should not include "shoreland".

R: "Shoreland" was struck.

C6: Could towns and counties be "encouraged" to simplify matters by coordinating their ordinances, thereby avoiding the whole debate over whose ordinance is "more restrictive"?

R: This is an issue above and beyond the establishment of minimum standards for shoreland zoning ordinances, and will need to be dealt with in local comprehensive planning processes.

C7: In subsection (4), what legal authority has established that the term 'state' is "defined as a unit of government and does not include the inhabitants of the state?" It may be a good idea to cite to that authority. What types of buildings, structures, and facilities are not for the benefit of the general public?

R: The definition is based on an opinion of the Wisconsin Attorney General (81 OAG 56, Opinion 9-93, June 30, 1993) as well as the wording in s. 13.48, Wis. Stats. If a project is for the benefit of the state, such as a state office building or a garage for state vehicles, the building must comply with the local zoning ordinance. If a project is for the benefit of the general public, such as a boat landing at a state park, it is not required to comply with local zoning ordinances.

C8: The note eliminates the requirement that buildings constructed for the general public are not required to comply with local zoning ordinances. These buildings are no different in their effect on the environment that a private home and should be subject to the same requirements as private development. The Forest County Zoning board is not in favor of relinquishing authority over type and placement of any building within their jurisdiction to the Department.

R: Although a structure constructed for the benefit of the general public can have the same impact as a structure constructed for private benefit, the Wisconsin State Legislature has determined that the benefits to the general public offered by these structures outweigh the need to comply with local zoning ordinances. (Please refer to the response to Comment 7.)

NR 115.03 Definitions

C9: There are too many definitions. Definitions that incorporate policy decisions, redefine common zoning terms or have implications that can only be understood in context with their relevant rule section should be eliminated. Policy decisions should be moved to the relevant section.

R: Over fifteen definitions were struck and portions of definitions that may be interpreted as policy decisions have been moved to the relevant sections.

C10: The following definitions are not needed: (4) Campground, (6) Compliant building location, (7) Conditional use (or special exception), (10) Dam, (12) Disabled, (14) Expansion, (21) Human habitation, (23) Inland lot, (25) Levee, (26) Lift, (27) Lot, (30) Natural areas management activities, (41) Porch, (45) Reasonable accommodation, (47) Residential structure, (48) Riparian lot, (59) Variance.

R: The definitions for "compliant building location", "human habitation", "inland lot", "porch", "residential structure" and "riparian lot" were struck. The definition for "expansion" was modified. The remaining definitions were retained to ensure consistent application of terms and standards.

C11: The following definitions are confusing or include policy that should be clearly set forth within the relevant subchapter: (2) Accessory structure, (5) Camping unit, (7) Conditional use (or special exception), (8) Conservation area, (12) Disabled, (15) Filtered view, (17) Footprint, (18) Forest land, (22) Impervious surface, (24) Land disturbing activity, (34) Non-permanent campsite, (35) Open fence, (37) Ordinary maintenance and repair, (40) Planned unit development, (46) Reconstruction, (55) Structural alteration, (56) Structural component, (57) Structure, (60) Viewing and access corridor, (61) Visually inconspicuous.

R: The definitions for "conservation area", "filtered view", "impervious surface", "planned unit development", and "reconstruction" were struck. The definitions for "footprint", "non-permanent campsite", "open fence", "ordinary maintenance and repair", "structural component", and "viewing and access corridor" (now "access corridor") were modified. The remaining definitions were retained to ensure consistent application of terms and standards.

C12: The term conditional use is a zoning term of art that should not be redefined within the context of NR 115. Confusion will result.

R: The definition was retained to ensure consistent application of terms and standards.

C13: The definition of "filtered view," combined with the definition of "structure" and "visually inconspicuous" and "non-conforming structures" means that all existing properties that are visible from the water are non-conforming. Additional non-conforming properties should not be created.

R: The definition of "filtered view" was struck.

C14: The filtered view concept is hard to understand, the rule gives very little guidance, some will view it as another infringement on private property rights, and it will be virtually impossible for it to be consistently enforced across different Department regions and by different county staff.

R: Please refer to the response for Comment 13.

C15: The definitions of "filtered view" and "visually inconspicuous" may result in numerous "frivolous" complaints and may be an enforcement nightmare. The rule should either be silent or encourage counties to determine if they want to become involved in this issue. Additionally, this language may create additional nonconforming properties.

R: Please refer to the response for Comment 13.

C16: The definition of land disturbing activity is too broad if it includes the terms "existing vegetation."

C: The definition of "land disturbing activity" retains the reference to "existing vegetation" to be consistent with the definition for "land disturbing construction activity" in NR 341 – Grading on the Bank of Navigable Waters - which references "existing vegetative" cover. Vegetation cutting or removal may still be permitted under s. NR 115.17 with this definition of "land disturbing activity" if the standards in s. NR 115.15 are also satisfied. Section NR 115.15 (3)(a) 3. provides that "Lawns and other areas where native vegetation was removed, prior to the adoption of the shoreland zoning ordinance amendment requiring a primary shoreland buffer, may be maintained, but not expanded, until establishment of a primary shoreland buffer is required by s. NR 115.21."

C17: "Non-permanent campsite" and "permanent campsite" provide definitions that will be difficult for zoning staff to monitor. Are there impacts that are different between a site occupied continuously by a succession of campers versus being occupied by a single camper?

R: There are different impacts between non-permanent and permanent campsites. On a permanent campsite, now considered a "residential use", accessory structures such as screen porches, decks, storage sheds and other buildings may be constructed or placed on the campsite. These types of structures are prohibited on "non-permanent campsites".

C18: To the "ordinary high-water mark" definition, add "or as established by elevation".

R: Establishing the elevation of the ordinary high-water mark once it is located, based on the definition, is an administrative task that counties may assume, but is not required. As an administrative task, it is not included in the definition.

C19: Is it possible to better clarify how the definitions of "ordinary maintenance and repair", "reconstruction", "structural alteration" and "structural component" apply to accessory structures that are not buildings? If not a definition issue, can the nonconforming and mitigation provisions better explain how accessory structures, that are not buildings, are impacted?

R: The definitions of "ordinary maintenance and repair" and "structural component" were modified. The definition of "reconstruction" was struck. Changes were made to s. NR 115.19 (3)(b) to clarify how accessory structures, that are not buildings, should be regulated.

C20: Planned unit development is a zoning term of art that should not be redefined within NR 115. Confusion will result.

R: The definition of "planned unit development" was struck.

C21: Can a clearer distinction be made between the "shoreland buffer area", "shoreland setback area", "shorelands" and "shoreland area"? They get to be confusing and seem to be used interchangeably.

R: The term "shoreland buffer area" was struck. The term "shoreland area" was replaced with "shoreland zone". The terms "shoreland setback area" and "shorelands" are defined by statute and used when appropriate.

C22: The definition of structure is too broad and too confusing.

R: The definition is intended to be inclusive.

C23: The definition of structural alteration should be modified as follows:

> (55) "Structural alteration" means the replacement or alteration of one or more of the structural components of a building's exterior walls for a principal structure or the replacement or alteration of more than 50% of the total area of a non-principal structure. ~~or any of the structural components of other types of structures.~~

Figuring 50% of the area of a non-principal structure is a straight forward measurement and does not present the issues arising from the 50% assessed value calculation currently used in NR 115 for principal structures.

R: Rather than making a change to the definition, changes similar to the above comment were made to s. NR 115.19 (3)(b) to clarify how structural alterations to accessory structures, that are not buildings, should be regulated.

C24: The current definition of structural alteration is also too broad for principal structures. It does not comport with a common sense understanding of structural alteration and will trigger mitigation for de minimis changes. Replacing a rotting windowsill or doorsill or other non-load bearing components should not require mitigation. We would suggest that the definition be modified to read as follows:

> (56) "Structural component" means any part of the framework or supporting structure of a building or other structure. The structural components of a building's exterior walls include the vertical studs, top and bottom plates, ~~and window and door sills and headers. A structural component may be non-~~load-bearing walls and any foundation components. ~~such as the framework of a wall at the gable end of a one-story house.~~ Wall-coverings, such as siding on the exterior and dry wall on the interior, are not included in the definition of "structural component."

R: Changes similar to the above comment were made to the definition of "structural component".

C25: Can a different term be used other than "substandard lot" that does not have a negative connotation?

R: The definition "substandard lot" was struck.

NR 115.05 Shoreland zoning districts

NR 115.07 Shoreland-wetland zoning

NR 115.09 Land division review

(1) Purpose

C26: Combine this purpose section and others into one location rather than repeating it in each section?

R: Please refer to the response for Comment 1.

(2) General

C27: Does the DNR have the authority to require counties to adopt land division regulations in shoreland areas? Wis. Stat. § 59.692(1m) requires counties to adopt a shoreland zoning ordinance for unincorporated lands, but there appears to be no similar requirement for land divisions in shoreland areas. In fact, the statutory authority granted to counties under Ch. 236 to adopt subdivision or other land division regulations is permissive, as indicated in Wis. Stat. § 236.45(2) ("any . . .county which has established a planning agency may adopt ordinances governing the subdivision or other division of land which are more restrictive than this chapter." Emphasis added). Accordingly, a mandate for counties to adopt land division regulations in shoreland areas appears to be in direct conflict with the discretionary authority to adopt land division regulations granted to counties by the legislature. I am aware that NR 115.05(4) currently requires counties to adopt land division regulations, but it is unclear whether the DNR has the authority to require such action, especially in light of the cited authority (Wis. Stat. §236.45), which, as stated above, is permissive.

R: Section 281.31 (1), Wis. Stats., charges that the "purposes of the regulations shall be to … control building sites, placement of structure and land uses" and s. 281.31 (6) requires that "such standards and criteria shall give particular attention to … shoreland layout for residential and commercial development." To achieve these statutory objectives, ch. NR 115 has historically and continues to require land division review in the shoreland zone to ensure that lots that are created to be buildable are in fact buildable.

C28: Add language that allows counties to adopt subdivision regulations by separate land division or subdivision ordinance. Most counties have such an ordinance and there is no need to duplicate.

R: Language was modified to state that counties shall land division review standards and does specify in what ordinance.

C29: Make the threshold lot size that requires review 5 acres or larger instead of 1.5 acres.

R: Language was modified to require review at 5 acres rather than 1.5 acres.

C30: Make the threshold number of lots that require review "5 or more", consistent with ch. 236, Wis. Stats, rather than 1 lot.

R: Language requiring review for 1 or more lots was retained to ensure that all buildable lots are created in compliance with standards in this rule.

C31: By requiring counties to review all land divisions of one or more lots, a new burden is placed on counties and significantly expands counties responsibilities that counties may or may not have the expertise to address. It also exceeds the standard of five more land divisions under ch. 236, Wis. Stats.

R: The requirement to review land divisions is not a new one, so counties should be able to continue using the expertise they have used in the past. If additional staff are needed to meet this requirement, fees could be established or increased for land division review.

(3) Navigable bodies of water within lots

C32: Prohibiting the creation of a parcel that is "divided" by a body of water is unworkable and will prohibit crossing certain large ditches or the creation of a lot that may have a small stream crossing a corner.

R: Language was modified to allow parcels to be divided by a body of water as long as shoreland setback and shoreland buffer provisions can be met.

(4) Substandard lots in common ownership

C33: Section should be titled "substandard lots…", not "substandards lots…"

R: Language was modified.

C34: This section should be included in section NR 115.19 with nonconforming provisions.

R: Reference to this subsection is made in s. NR 115.19.

C35: Does this apply differently to lots if they are developed vs. undeveloped? It is not clear.

R: Language was modified to clarify that this subsection applies to developed and undeveloped lots and parcels of land.

C36: How will this affect new lots that may be deemed "substandard" based on the new standard to measure lot width?

R: A parcel or lot that does not meet the minimum area or width standards would be subject to this provision if abutting lands are in common ownership.

C37: Why are sewered lots treated differently than unsewered lots?

R: This provision was removed because it was no longer needed based on changes to minimum lot size standards.

C38: Why use "July 1, 2004" as the magic date rather than the date of the first public hearing on changes to NR 115 or the effective date of the code?

R: Please refer to the response for Comment 37.

C39: Does this provision make sense when if someone owns multiple substandard lots, all the substandard lots may be built on, but not sold separately? There lots out there that are only 2,000 square feet in size platted from the 1920s and 1930s.

R: If someone owns multiple undeveloped lots that do not comply with the minimum lot size standards proposed in s. NR 115.11, the lots would need to treated as one parcel and the density of development that would be allowed for the one large parcel would be subject to s. NR 115.11. The owner of several lots that total 20,000 or 10,000 square feet would be treated the same as someone who owns one lot that totals 20,000 square feet if unsewered or 10,000 square feet if sewered.

C40: The prohibition on these lots should be removed if the lots can meet all other standards in NR 115.

R: This subsection is not a prohibition on "substandard lots" rather it simply requires that lots in common ownership that do not meet minimum lot size standards in s. NR 115.11 should either be treated as one parcel or should be re-divided to meet minimum lot size standards. Buildings may be constructed on substandard lots if other applicable standards can be satisfied.

C41: This may have negative ramifications on property values and the local tax base.

R: This subsection may have a "positive" effect on property values and the local tax base by ensuring that parcels or lots put up for sale meet minimum lot size standards or are at least as large as possible and allow future property owners more options. One 20,000 square foot parcel may be more valuable and more desirable than four 5,000 square foot parcels.

C42: This provision could have a significant financial impact on property owners who legally subdivided property according to the regulations in effect at the time of the subdivision. By requiring these lots to be merged into larger lots that meet the newly proposed lot-size requirements, the cumulative value of these lots will decline. Many property owners own a substandard developed lot with an adjacent substandard undeveloped lot. Under this proposal, the property owner would be prohibited from selling or transferring either lot (developed or undeveloped) unless the lots were merged to create a lot that conforms to the new minimum lot-size requirements. To protect the investment-backed expectations of property owners, all pre-existing lots should be grandfathered. At a minimum, this section should be modified to make it clear that 2 or more substandard, undeveloped lots that are adjacent to one another and in common ownership should be merged.

R: The minimum lot size standards for single-family residences and duplexes was changed back to the existing standard to minimize the number of new lots becoming nonconforming.

C43: This requires the replatting of existing lots. Furthermore, it prohibits the sale of legal, conforming lots if those lots are adjacent to a non-conforming lot and forces property owners to give up significant economic value by combining separate existing lots.

R: With the proposed change in the minimum lot size standard, it should primarily only affect lots platted prior to 1968.

(5) Keyhole Development

C44: This places new limitations on "keyhole" development. All of the text after the first sentence is unnecessary.

R: The existing rule has no standards on keyhole development. The proposed standard are new, but closely mirror existing minimum lot size standards.

C45: Does this apply the same to single-family lots and multiple-family lots that use a keyhole lot to access a navigable water? It appears to, but three homes may have less impact than 3 apartments. Clarification is needed.

R: The standards was changed to "per dwelling unit" to clarify.

C46: The width of the lot should be measured at "75 feet or as established by county ordinance" or at "the county required setback".

R: Language modified as suggested. See s. NR 115.11 (2)(c).

C47: The requirement for additional frontage for each additional inland lot should be "50 feet or more".

R: Language modified as suggested.

C48: Is it really necessary to include examples of other conditions that a county may impose on keyhole lots? Why not delete the second to the last sentence in s. NR 115.09 (5)(intro.)?

R: Language struck.

C49: This appears to be regulating where you can live. The state should not be regulating keyhole developments. It seems illogical for the state to prohibit, for example, three people living across the street from owning a waterfront lot, but allow three people living out of state to own the same waterfront lot. The state should not attempt to regulate who may own waterfront property or the form of ownership through which people can own waterfront property. If a county wants to regulate the manner in which a waterfront lot is owned, then the county may choose to do so.

R: The issue was identified in listening sessions comments as something that should be addressed in NR 115. The use of a parcel for "access" is different than the use of a parcel for a residence, and distinct standards for each type of use is needed.

C50: Shouldn't this provision only apply to lots where access to inland lots has been "deeded"? That is how Bayfield County regulates "keyhole" developments.

R: Language was modified to apply to lots where access rights have been granted in a deed or other legal conveyance.

C51: The proposal limits the construction or placement of any structure on the keyhole lot. Should structures that are "exempt" or "permissible" be allowed? Structures that provide access and safety, prevent erosion, and provide enjoyment of riparian rights must be allowed on a riparian keyhole lot.

R: Language was added to allow stairways, walkways, and lifts; chapter 30 and 31 structures; and erosion control structures.

NR 115.11 Minimum lot size

(2) General

C52: Rather than measuring at the ordinary high-water mark (OHWM) and 75-feet from the OHWM, could it rather read to measure at the OHWM and the OHWM setback, in case counties have adopted a larger setback? In some cases a non-riparian lot may only have a very narrow access point to a roadway which may not be typical of the width of the majority of the lot. Is some kind of alternative for determining lot width in this situation?

R: Language modified as suggested for measurement at OHWM setback. No alternative has been suggested to address lots with very narrow access points.

C53: To be consistent with the measurement standards for other lots, the width of a riparian lot should be measured only in one place -- at the OHWM. Requiring lots to be measured at both the OHWM and the setback line will make it difficult to subdivide property that is subject to unique topographical limitations. Because counties have employed a myriad of techniques for measuring lot width over the years, this provision should apply only to newly created lots (those created after the effective date of the NR 115 re-write) to avoid creating more nonconforming lots.

R: This issue has been a topic of much debate by Advisory Committee members and the proposed language is a compromise of the alternatives suggested.

C54: Could the setback measurement method start on the date the code becomes effective so existing lots that were measured in a different way are not deemed "substandard"?

R: The new setback measurement method will become effective on the date that the new rule takes effect and, by definition, existing lots that are not wide enough using the new method will become substandard but lots that are substandard may be developed as long as shoreland setbacks, shoreland buffers, and land disturbing standards are satisfied.

C55: Does paragraph (c) belong in this section? Would it be better to place in NR 115.05 with a title of "Prohibited uses in a shoreland zoning district"?

R: Language struck.

(3) Residential structures

C56: As written, the current draft will create many non-conforming lots that were created before its implementation. Riparian landowners in Wisconsin fear their land falling into the "non-conforming" category, and rightfully so. This is a red flag, and it affects property value. All lots of record created before this process is finalized should be subject to the rules in place at the time they were recorded.

R: Language was modified to reflect existing standards for single-family residences and duplexes to minimize the creation of new substandard lots.

C57: Lot sizes should remain as the current NR 115 requires which is 20,000 square feet and 100 feet width for non-sewered lots and 10,000 square feet and 65 feet lot width for sewered lots. This proposal creates to many nonconforming lots and is more appropriate for a county that wants to adapt a waterbody classification based ordinance. Better buffer requirements and impervious area limits will help deal with this issue.

R: Please refer to response for Comment 56.

C58: The proposed minimum lot-size requirements are problematic for areas serviced by public sewer. Increasing the minimum area requirement from 10,000 sq. ft to 20,000 sq. ft. and the minimum width requirement from 65 ft. to 100 ft. will make waterfront lots even more expensive and ownership even less attainable for most Wisconsin families. Owning a home or a cabin on the waterfront will now be a dream realized only by the most affluent. Furthermore, by changing the standards, the new lot-size requirements will likely create a significant number of nonconforming lots, which will impact the value and use of property throughout the state. Because these standards apply to newly-annexed shoreland parcels, these standards may also present problems in urban areas.

R: Please refer to response for Comment 56.

C59: The proposed minimum lot-size requirements unfairly discriminate against multi-family development by increasing the minimum lot size and width requirements for each dwelling unit within a building. In developing these standards, the State has failed to demonstrate that a building with a 1000 sq. ft. footprint will have a greater negative impact on the environment if it is a duplex, rather than a single-family dwelling, or that a building with five units will have a greater negative impact on the environment than a building with four units. Without adequate science to support such a proposition, this appears to be an unreasonable attempt to control private access to waterways, destroy private property rights, and interfere with local zoning decisions.

R: The intention of regulating the number of dwelling units is not to limit the amount of impervious surfaces or to control stormwater runoff, rather increasing the parcel as the number of dwelling units increase is to ensure that there is enough room to accommodate the use of the parcel by the increased number of people and for their to be adequate room on the parcel to mitigate the use of the parcel by more than one dwelling unit.

C60: The State should not regulate the size of lots that do not abut navigable waterways. This is clearly a local zoning function in which the State should not engage itself.

R: The statutes define the shoreland zone as extending 1000 feet from lakes, 300 feet from rivers, or to the floodplain. The statutes also require the establishment of regulations for the placement of structures and land uses, and particular attention to shoreland layout for residential and commercial development. To fulfill the statutory objectives of ch. NR 115, the rule will continue to establish minimum lot sizes that apply to entire shoreland zone.

C61: May the county permit the placement or construction of a structure, other than a residence, on a lot that does not meet the minimum lot size? The introduction only mentions residences.
R: Language clarified to apply to any structure.

C62: How does the lot size standard apply to hotels, motels, resorts, time-shares, condominiums or other rental-type properties? When is a structure a "residential structure" or an "other use"?
R: If a project meets the definition of residential use and contains dwelling units (such as a hotel or motel, or condominium-owned or time-share apartment buildings), then it will be treated as a residential use. If it does not, then it will be treated as an "other use".

C63: For sewered lots, this language may have negative ramifications on property values and local tax bases and may create additional workload because, in many cases, may conflict with existing ordinances.
R: Please refer to response for Comment 56.

(4) Campgrounds

C64: In general, it would be better to regulate the use of campgrounds by the use of setback, density and buffer requirements.
R: Language modified as suggested.

C65: Are "storage sheds, decks, and screened porches" excepted with legal nonconforming structures or are they prohibited at a campground site unless the site meets minimum lot size requirements?
R: Language modified to clarify.

(5) Other uses

C66: Are time-shares units a type of residential structure or an "other use"? What about condominiums that are rented? Please provide more clarification.
R: Please refer to response for Comment 62.

C67: The density requirements for "other" uses are new and arbitrary.
R: Language changed to 20,000 square feet to reflect existing standard.

C68: This section imposes the same unreasonable minimum lot-size requirements to commercial, industrial, and other non-residential property. Again, this should remain a local zoning decision.
R: Please refer to response for Comment 67.

(6) Planned unit development

C69: Does this rule make planned unit developments of less than five acres illegal? If so, why?
R: New planned unit developments in the shoreland zone would have to be at least five acres in size to qualify for decreased lot sizes. Existing planned unit developments that are less than 5 acres would be legal nonconforming uses.

C70: Generally speaking, the inclusion of PUD standards in this code unnecessarily complicates NR 115 and is yet another example of the State overreaching into the area of local zoning decisions. Specifically, this provision should not prohibit PUDs on less than 5 acres, require a minimum increase for BOTH setbacks AND buffer areas, and include approval criteria unrelated to shoreland development (avoid new construction on hilltops and ridges, preservation of valuable historic, archaeological or cultural sites, protection of rural character, and provision of reasonable contiguous conservation areas . . .). Lastly, the "incentives" are insufficient to truly encourage PUDs and take away the necessary flexibility for counties to make PUDs a success in the marketplace.

R: Minimum standards for PUDs were simplified and incentives were adjusted.

C71: Why isn't there a break in the lot width as well as the lot size for planned unit developments?

R: Lot width requirement was struck because minimum setback was increased to 125 feet as a compromise.

C72: I am not in favor of any change. A "break" in the lot width will mean that all the development will be concentrated in the first and second lot tiers (from the water) with the "open space" well back from the water. This will create much more adverse impact on the shoreland/waters. This is demonstrated in much of the condo development that has already taken place. Planned unit development would be no different.

R: Please refer to response for Comment 71.

(7) Substandard lots

C73: This section should be moved to the nonconforming section because it is more appropriate for existing lots.

R: Reference to this section was added in s. NR 115.19.

C74: Can a different term be used other than "nonconforming" or "substandard" for this type of lot? What about "legal substandard lot"?

R: Substandard was used because it is a commonly used term.

C75: The proposal is unworkable as written and provides no relief for the most critical shoreland issue: pre-existing substandard lots. This paragraph should simply state that a lot that was a legal lot of record at the time that the ordinance or ordinance amendment took effect may be used as a building site.

R: Language was modified and a lot that does not meet current minimum lot size requirements may still be used as a building site if the proposed structure can satisfy the shoreland setback, shoreland buffer and land disturbing standards.

C76: There are concerns about lots that were previously considered conforming, but have a lot width that will now be nonconforming because of proposed rule changes that require lot width to be measured in a different way.

R: Please refer to response for Comment 54.

NR 115.13 Shoreland buffers – structural setback standards

(2) General

C77: Why does this proposal reward counties who have historically violated the current standard of measuring the OHWM setback to the nearest point of the structure? By providing an option to measure to the foundation, rather than the roof overhang, this just continues to reward them,

rather than making them do the right thing. Go back to requiring the measurement to the nearest point of the structure.

R: To avoid making these structures nonconforming, counties that have historically measured to the foundation may continue to do so if the overhang does not exceed 3 feet.

C78: How to measure roof overhangs is an example of where the rule is too complex. Does 3-feet of roof overhang that may or may not be a problem truly justify a paragraph in NR 115?

R: Please refer to response for Comment 77.

C79: Can't the rule require measuring to roof overhangs for buildings constructed after a certain date, but not measure to roof overhangs for existing structures?

R: Under general zoning law, if a structure does not comply with a new standard, it is by definition nonconforming. Different standards can be created for different categories of structures or properties, but a distinction cannot be legally based on the mere fact that one structure was built before another structure.

C80: The 75-foot setback should be changed to "county required setback to the OHWM".

R: The minimum setback from the OHWM is 75 feet, but counties may adopt a larger setback.

C81: The definition for mobile homes should be placed in the definition section or another more appropriate section.

R: Definition struck.

C82: Does this provision allow ice shanties to be stored in the shoreland buffer over the summer? If not, could they be listed under "permissible structures" so counties can decide whether or not to allow them within the shoreland buffer? The proposal allows winter storage of piers and rafts within 75-feet of the water, but apparently not summer storage of ice shanties. Please explain the department's bias in favor of boaters and swimmers and against fishermen. This is an example of an issue that should be dealt with locally if it is a problem.

R: Summer storage of structures, such as ice shanties, in the shoreland setback area would result in the destruction of vegetation as the structure shades the vegetation underneath it. Winter storage of piers and rafts is unlikely to damage vegetation since the vegetation is dormant in the winter.

C83: Support the provisions in paragraph (2) because it allows counties enforcement flexibility.

R: To allow flexibility, provision must be included to permit it.

(3) Exempt structures

C84: A note should be added that says that counties can not be more restrictive than what the listed statutory provisions allow for exempt structures.

R: Language modified to clarify.

C85: Why are fishing rafts required to be in the viewing and access corridor?

R: Language struck.

(4) Permissible structures

C86: It is not clear what is intended by the two different authorizations "Counties may permit" and "Counties may allow without the issuance of a permit?" Does the word "permit" in the first phrase mean that we are giving counties some permitting authority that they don't have or does it mean that we are simply authorizing counties to allow these structures? If the former, we have

major concerns. If the later, the two standards seem redundant given the other phrase "Counties may authorize through the issuance of a conditional use permit . . .."

R: Language modified to clarify exemption standards and permitting system standards.

C87: It seems that allowing counties to allow these permissible structures without a permit conflicts with the administrative provision to require counties to have a permit system for all new development. Can this be clarified?

R: Please refer to response for Comment 86.

(a) Water dependent structures

C88: The consensus of the Advisory Committee was that new boathouses should not be exempt from shoreland setback requirements. Why are wet boathouses listed as permissible structures in this draft? New wet boathouses are prohibited by statute with certain exceptions. Can counties be less restrictive than ch. 30 and ch. 31, Stats., ? Can counties prohibit wet boathouses that state statute would allow?

R: Wet boathouses are regulated under ch. 30, Stats., and were listed as an example of a ch. 30 structure. Counties generally have the authority to adopt regulations for structures on lakebeds as long as those regulations do not conflict with the provisions in ch. 30, although they are not required to. However, because a state statute specifically authorizes the repair and maintenance of wet boathouses if the criteria listed in the statute are met, counties may not prohibit wet boathouse repair or maintenance that the state statute authorizes.

(b) Walkways, stairways and lifts

C89: Walkways, stairways and lifts should be exempt provided they meet the criteria in (4)(b).

R: Language was modified, but still includes construction standards.

C90: The proposal prohibits walkways in "environmental sensitive areas," without defining such an area.

R: Language struck.

C91: Proposal could be simplified to state that walkways shall be permitted, provided they are designed to be visually inconspicuous when viewed from the water (all of the other language is redundant).

R: Please refer to response for Comment 89.

C92: For stairways, what if you need a landing at less than 12 feet? The UDC requires landings to be no more 12 feet apart, and allows the landings to be closer together if needed. Perhaps "no more than one landing for every 12 feet" should be clarified to say "no more than one landing for every 12 feet of elevation difference."

R: Language modified to allow a landing at top of stairs, bottom of stairs, and where necessary for change in direction.

C93: Why is the code trying to regulate the number of stairways that a property owner can have? Has this really been a problem in terms of protecting the public trust? Isn't this form of regulation better suited for county zoning ordinances, rather than state minimum shoreland zoning standards? Will this new standard result in a greater number of nonconforming properties?

R: The number of stairways is limited to prevent damage to primary shoreland buffer. If a property has more stairways that the proposal allows, the stairway could be maintained indefinitely.

C94: It is not clear how the size or frequency of landings has interfered with the DNR's ability to protect the public trust. If a property owner believes they need a bigger landing than 40 square feet or would like to place a landing more frequently than once for every 12 feet in elevation, it seems reasonable to allow them to construct it.

R: Please refer to response for Comment 92.

(c) Signs

C95: Simplify language about signs by stating that "counties shall, by ordinance, regulate signs in the shoreland setback to preserve wildlife habitat and natural beauty."

R: Language was modified similar to suggestion.

C96: This provision only allows informational signs ("for sale" signs, etc.) within the shoreland setback if the county regulates signs and associated lighting in order to preserve wildlife habitat and natural beauty. How many counties currently regulate signs and sign lighting? For those counties that do not have such regulations, this provision will prohibit property owners from placing "for sale" signs, political signs and other informational signs within the shoreland setback of their property. This will obviously infuriate many property owners.

R: A county may allow "for sale" or other signs, but the county ordinance would simply need to set standards for those signs.

C97: Can political signs or for sale signs be prohibited? Wasn't there a new court decision on signs in Waukesha County?

R: There was a court case in Waukesha County recently, but it is not clear if "for sale" signs share the same protection as political signs.

(d) Water quality improvement structures

C98: Water quality improvement structures should also be exempt. If someone wants to install a rain garden or a small retention pond, why should a permit or mitigation be triggered? These structures should be considered mitigation, not require mitigation themselves.

R: A rain garden or pond would not meet the definition of a structure and installation of one would not trigger mitigation requirements.

C99: Does the water quality improvement structures' section mandate vegetated buffers that are not mandated by NR 151?

R: The proposed buffer is limited to the portion of the waterway impacted by the structure, not the entire waterway frontage owned by the property owner. Buffer standards for NR 151 are still being worked out so it is not possible at this time to answer this question.

C100: It seems that 115% as a threshold for the cost of water quality improvement structures is really low. What about 150%?

R: 115% was suggested by the Ag Workgroup, but counties may adopt a standard of 150% if they choose to.

(f) Structural erosion control measures

C101: For structural erosion control measures, the language could be simplified to allow "if necessary to control erosion, provided the structure is designed to be visually inconspicuous from the water". Let counties take care of any remaining details as needed.

R: Language was modified to provide examples of how the visually inconspicuous standard could be achieved.

C102: Structural erosion control measures can be appropriate in many situations for erosion control and site stability and can be made visually inconspicuous. We are not seeking an exemption but we should not unnecessarily restrict appropriate use of these structures. For example, what about replacement of a retaining wall that is currently supporting a principal structure or large trees? We would suggest revision to these requirements as follows:

> (f) *Structural erosion control measures*. Structural erosion control measures that are located entirely above the ordinary high-water mark, such as retaining walls, may be allowed within the shoreland setback area if the local zoning authority determines that the structure is necessary to address or prevent ~~only structural erosion control measures can adequately address significant on going~~ erosion or provide necessary site stability for existing principal structures, and if the county requires that the structure shall be screened with vegetation, constructed of natural materials or otherwise designed to be visually inconspicuous when viewed from the water.

R: Language modified similar to suggestion for existing structures.

(g) Marine fuel dispensing systems

C103: Requiring aboveground marine fuel tanks to not be visible from the water seems a tough standard. How about just requiring screening? (that is, remove the words "by vegetation so that they are not visible from the water.")

R: Language struck.

(h) Parking areas at access sites

C104: The term "no other feasible location" is very vague and may allow a parking area to be placed within the shoreland setback area when an alternative for a parking area exists outside of the shoreland setback area.

R: If an alternate location is available, it would be necessary to demonstrate why it is not feasible. A county may adopt standards to further determine what is feasible.

(j) Utilities

C105: Should there be a cross-reference to the shoreland buffer vegetation standards in the structural standards for utilities?

R: The shoreland buffer vegetation standards in s. NR 115.15 are not cross-referenced in other paragraphs in s. NR 115.13(4) and (5), so one was not added for utilities. It is not necessary to cross-reference to all of the other potentially applicable requirements in ch. NR 115.

C106: Is the language for utilities consistent with the PSC administrative rules that regulate transmission lines? Should it be "distribution lines" or both?

R: We believe so. Transmission lines are listed only as an example.

(m) Open fences

C107: Open fences should be defined in the definitions.

R: It is defined.

C108: There is no mention of open fences being allowed in the primary buffer is in draft #2. Does this mean they are not allowed at all in the primary buffer? This should be clarified in the draft.

R: A note was added to clarify.

C109: Are 7-foot high permanent fences to prevent deer damage to vegetation allowed? If not, can they be allowed if they are not readily visible from the water?

R: Current proposal would not allow 7-foot high permanent fences to prevent deer damage in the shoreland setback area.

C110: While I have empathy with everyone confronted with deer damage as I have just about given up trying to grow certain things, e.g. tulips - how would allowing 7-foot high permanent fences square with "preserving, or reestablishing adequate fish and wildlife habitat", one of the four goals the DNR seeks to achieve? I would not be adverse to allowing a 7-foot high fence around a small vegetable/fruit garden if not visible from the water, but can not justify a fence around the perimeter of the lot which would prevent the migration of animals.

R: Please refer to response for Comment 109.

(5) Setback reduction process

C111: This provision appears to be an attempt to replace setback averaging. Setback averaging is an important land-use tool that provides counties with flexibility when applying new setback standards to pre-existing lots.

R: Language was amended to allow counties to request approval for other methods to reduce shoreland setbacks.

C112: Setback averaging is currently permitted under Wisconsin state statute, and counties should continue to have the option to use setback averaging or clarify the language for setback averaging. Setback averaging is a simple, equitable, and logical process with little or no environmental impact.

R: Please refer to response for Comment 111.

C113: Could the 1,500 square foot footprint limit apply to a residence and garage, regardless of whether or not the garage is attached? In many situations the slope of a lot on the water may only allow for a detached garage to be placed closer to the road than the residence.

R: Language was modified to allow garages, either attached or detached.

C114: The 1500 sq. ft. maximum footprint for all structures is unreasonably low. Because garages are included in the calculation, the maximum footprint size should be 2000 sq. ft..

R: The 1500 square foot cap only applies to structures built or expanding within the shoreland setback area – closer than 75 feet. According to the National Association of Homebuilders, the average single family house built in 2004 was 2,272 square feet with a two-car garage. The proposed footprint could accommodate a 500 square foot garage, 1,000 square feet of living space on the first floor, and 1,500 square feet of living space on the second floor, if the garage is attached, totaling 2,500 square feet of living space, exceeding the size of the average single-family home built in 2004. A cap of 1,500 square feet seems adequate.

C115: Mitigation standards, in addition to the other limitations, should not be imposed upon a property owner simply because they are trying to build upon a substandard lot.

R: The proposed performance standards are applicable to all new construction or replacement (not just on substandard lots) in order to help achieve the statutory objectives of the program. Additional standards are placed on structures building at a reduced setback (closer than 75 feet to the OHWM) to mitigate the impacts of the structure being built close to the water.

C116: Provision mirrors language in NR 115.09(4) requiring an owner of more than one lot to replat his property, thereby depriving him of significant economic value.
R: Language struck.

NR 115.15 Shoreland buffers – vegetation standards

(1) Purpose

C117: How enforceable are shoreland buffer provisions? Is it possible to simplify the provision to allow or require counties to adopt shoreland vegetation standards to accomplish the purposes set forth in NR 115.15 (1)? While vegetative buffers are considered to be important, public hearing testimony on this subject from both citizens and regulators has identified that it will be difficult, if not impossible, to enforce.
R: Goal of proposed standards is to make them more enforceable than current standards – a problem identified by many counties.

(3) Vegetative buffers

C118: There is no scientific evidence demonstrating that an additional 15 feet (from 35 feet to 50 feet) will have any significant ecological impact; however, it will have detrimental social and economic impacts. This change is simply not needed, justified, nor does it have broad public support.
R: A review of the scientific literature had shown the 35-foot buffer to be inadequate to meet the statutory objectives of the program, resulting in the proposed increase to 50 feet.

C119: Reword to read "…vegetation shall be preserved, or where required to be established…"
R: Language modified similar to suggestion.

C120: This paragraph requires the property owner to replace any vegetation that has been removed. Does this eliminate the need to put in the statement in 115.15 (3) (a) 3 "if replaced in compliance with subd. 2.? This could be a county administration problem with enforcement.
R: Language modified to clarify.

C121: Property owners who remove exotic or invasive species, diseased vegetation, damaged trees or shrubs, or trees/shrubs that present an imminent safety hazard should not be required to replace this vegetation with native vegetation.
R: Replacement of vegetation is necessary to ensure that the primary shoreland buffer can function as intended. If vegetation is not replaced, the bare soil could actually lead to erosion and sedimentation problems.

C122: It would be useful to allow the removal of vegetation for any reason consistent with a plan approved by the county, like canopy-thinning for revegetation after a weather event, removal of natives to aid in the re-vegetation of an area after removal of non-natives, removal of mature vegetation to promote more understory growth to aid in erosion-control, removal of trees to prevent the spread of disease, etc. We should not tie the hands of the County if they want to use vegetation removal to accomplish the other goals of these or other rules.
R: Canopy thinning is not prohibited and management techniques to restore or enhance native vegetation can be permitted under the Natural Areas Management provisions.

(4) Viewing and access corridor

C123: This provision requires so much tree cover in the viewing access corridor, there won't be much access to a view. As the terms are defined in the rule, "any structure" must be "difficult to see"

from the water, and as a logical result, the water will be difficult to see from the home. This will create significant property owner resistance and enforcement difficulties for local officials. It is unreasonable to allow a property owner only a "filtered view of the water." This provision is an unreasonable restriction on the use and enjoyment of riparian property

R: Filtered view language was struck.

C124: As most recently re-written, NR115 will allow viewing corridors much wider than currently allowable. (Refer to page 27 of the 8-24-04 draft.) Corridors may be "30% of the lot's water frontage" without a maximum width. Currently, corridors may be "no more than 30 feet in any 100 feet" and this has been interpreted to mean that the maximum width of any single corridor is 30 feet. As re-written, much more natural vegetation will be removed, and along with it will come more storm-water run-off into lakes, less habitat for wildlife, and degradation of scenery.

R: Language was modified to limit access corridor width at 20% or 60 feet, whichever is greater, on lots with 200 feet or more of frontage.

C125: Support paragraph (a) because it provides counties flexibility, support paragraph (b) because it is essential to maintaining water quality, and it is difficult to address paragraph (c) because it seems a pragmatic approach for condos.

R: Paragraph (c) was modified to clarify.

C126: As re-written, the corridor is to provide "...a filtered view of the water from the principle structure on the lot...," but the "filtered view" is not defined or enforceable. What is defined is that 30% of the waterfront can be cleared. A 50- or 60-foot wide (not to mention a 75- or 100- foot wide) clear-cut is not a filtered view, I don't think. It is certainly not a filtered view of the house from the water. And at night it will allow light from windows to glare clear across the lake. An uncapped 30% wide viewing corridor may completely negate the small gains of requiring a 50-foot buffer. I can see that the uncapped 30% buffer makes for simple language in the re-written NR115. But the effects on the lakes are much more important than readability of the rules.

R: The option of one corridor or multiple corridors is left to the county or the property owner to decide. If one large corridor is allowed, it concentrates the impacts in one area, rather than stretching it out along the entire shoreline. If multiple corridors are allowed, it results in greater fragmentation of the habitat. The proposal allows counties and property owners to select which option is better to suited to local conditions.

C127: As re-written, the statement ". . . width of the corridor(s) do not exceed 30% of the lot's water frontage." sounds like a recommendation for the width of viewing corridors. Builders are likely to learn the 30% rule and suggest it to property owners when they clear the land for a new house. And property owners, building a house on the lake for the first time, are not likely to think about it and visualize whether their lot would be more pleasant with less trees removed.

R: An associated educational effort can help people understand the steps in developing or redeveloping shoreland property, to help prevent unnecessary clearing.

C128: The draft of 5/18/04 allowed a width of ". . . 30% of the lot's water frontage or 30 feet, whichever is less." For multiple family residences, and other uses it allowed wider corridors or multiple corridors. This was not hard to understand and enforce. The proposal should back to 30-feet-per-100, or to 30 feet maximum, for the width of viewing corridors. It should also state a recommendation that, for a filtered view, some trees could be left in the corridor. It's the best for the health of the lakes.

R: Please refer to response for Comment 126.

C129: Suggest replacing the word "cutting" with "removal" in NR 115.15(4)(a) for consistency with the rest of the section.
R: Language was modified to use "removal" consistently. "Removal" was used because it is more inclusive.

C130: Required on the ground in the viewing corridor is " . . . ground layer vegetation, such as turf grass, . . ." This is for practical purposes a lawn. Lawns are not recommended by environmentalists, ecologists or experts at UW Extensions because of the destruction of habitat, and additional runoff, some of it inevitably polluted with lawn fertilizer or herbicides. Of course, the viewing corridor is placed in front of the house, below the house and driveway, where it conducts the greatest amount of storm-water run-off.
R: The secondary shoreland buffer and access corridor must be vegetated. If vegetated with lawn, they may still perform some filtering functions, depending on the management of the property. The secondary shoreland buffer is not expected to perform the same functions as the primary shoreland buffer, which has more protective standards.

(5) Agricultural practices and farm drainage ditches
C131: What are horticultural facilities? Does that term need to be defined?
R: Language struck.

(10) Road and driveway maintenance activities
C132: The references to chs. 80 and 81 will need to be changed to ch. 82, which takes effect on January 1, 2005.
R: Language modified to reflect new references.

(12) Lots with reduced setbacks
C133: How does the maintenance of a 35-foot primary buffer depth work as applied to nonconforming structures located closer than 35 feet to the OHWM?
R: Language requiring a minimum 35-foot primary shoreland buffer was struck.

NR 115.17 Land disturbing activities

(2) General
C134: If ch. NR 216, Wis. Admin. Code, is referenced in a rule, does it imply that NR 216 should be administered statewide, even if in ch. NR 216, Wis. Admin. Code, it only applies to certain local units of government?
R: Language is intended to ensure actions are carried out consistent with other applicable state and federal laws. Chapter 30, Wis. Stats., and ch. NR 216, Wis. Admin. Code, are listed as examples of laws that may apply in these situations. It does not create a new requirement.

C135: This provision creates another regulatory layer that is redundant with existing stormwater and erosion control laws.
R: Please refer to response for Comment 134.

NR 115.19 Nonconforming uses and structures

(1) Nonconforming uses
C136: Wis. Stat. Sec. 59.69 (10) allows property owners to alter, add on, and repair buildings being used for a prohibited trade or new industry ("nonconforming use") up to 50% of the building's assessed value and authorizes counties to prohibit such activities beyond the 50% limit. By

prohibiting ANY alteration of or addition to buildings being used for a nonconforming use, this provision appears to be in direct violation of state statute. This section should be modified to accurately reflect state statutes.

R: Section 59.69 (10), Wis. Stats., prohibits counties from outlawing the continuation of nonconforming trade or industrial uses. However, s. 59.69 (10) allows counties to limit alterations and additions to existing structures that are used for such nonconforming uses, and states that alterations and additions that exceed 50% of the assessed value of the structures may be prohibited. Consistent with, but more broadly applicable than, s. 59.69 (10), Wis. Stats., section NR 115.19 (2) states that a county **may** regulate or prohibit the alteration or addition to a building with a nonconforming use. If a building used for a nonconforming use is also a nonconforming structure, only then would s. NR 115.19 (3) and (4) also apply.

C137: Shouldn't language that recites a statute be a note, rather than a rule?

R: For clarity and consistency, the statutory language is repeated.

C138: In the statutes, the term "prohibited trade or industry" is used. Why does this code use "nonconforming trade or industry"?

R: The terms "prohibited" and "nonconforming" can be used interchangeably, and for consistency, the term "nonconforming" is used in this section.

C139: "Non-conforming" is clearer. "Prohibited" implies a specific listing of prohibited uses rather than all those not specifically allowed.

R: Please refer to response for Comment 138.

(2) Nonconforming accessory structures

C140: Neither current statutes nor current administrative rules require counties to regulate all nonconforming accessory structures in the shoreland buffer area. Current law also does not prohibit counties from allowing structural alteration to nonconforming accessory structures, nor does it allow structural alteration only if mitigation requirements are met. Finally, current law does not require counties to prohibit expansion or reconstruction of a nonconforming accessory structure. Accordingly, this section of the proposed rule is a significant change from current law and it places new and unreasonable restrictions on the ability of property owners to improve their property.

R: The existing standards do not distinguish between nonconforming accessory or principal structures. The proposed standards for nonconforming accessory structures would allow unlimited ordinary maintenance and repairs and would not limit structural alteration as long as the structure was rendered visually inconspicuous. Structural alterations, if a county used a 50% rule, are currently limited to 50% of the equalized assessed value of the structure. The proposed standards has no limit on the cost of alterations.

C141: The term "structural alteration" needs to be modified for accessory structures. Currently, many simple repairs will be considered an alteration. For example: an access stairway that needs a replacement of a riser or tread could be a structural alteration. Requiring the owner to get a permit before repairing the stairway, and then file an affidavit with the county within 14 days, giving notice of the required mitigation, and then doing mitigation is not reasonable. The same would hold true for replacing a cap board on a retaining wall, fixing a broken railing on a walkway, and many other repairs.

R: Structural alteration language was modified to apply when 25% or more of a non-building accessory structure is altered. The affidavit language was struck.

C142: In paragraph (a), "may" should be replaced with "shall."
R: Language modified as suggested.

C143: More clarification is needed on how these provisions affect structures that are not buildings. What is the difference between "ordinary maintenance and repair" and "structural alteration" for structures other than buildings? Is replacing a tread on a stairway ordinary maintenance or a structural alteration? What about changes to retaining walls? A certain threshold should be met before mitigation is triggered. Can we use the criteria that the work will "extend the life of the structure" to determine if mitigation is required?
R: Please refer to response for Comment 141.

C144: Ordinary maintenance and repair of accessory structures is often tied to safety or property protection. People should not be required to sift through disproportional red tape to protect their safety and investments.
R: The proposal does not place limits on ordinary maintenance and repairs. It is unclear what "red tape" would be generated.

C145: Is the concept of rough proportionality of mitigation to the proposed improvements still in this draft?
R: Yes. For expansion of a principal structure, only the water quality and natural scenic beauty performance standards need to be met. For construction or replacement of a principal structure, the water quality, wildlife habitat, and natural scenic beauty performance standards need to be met. The larger, more involved projects require are held to a higher standard.

C146: Does the term "ordinary maintenance and repair" include foundation repair or replacement? This needs to be clarified.
R: Yes – language was added to definition to clarify.

C147: Does the statutory provision s. 59.692 (1s), Wis. Stats., apply to accessory structures if they are burnt down? Is a reference needed to that section?
R: Yes – language was added to s. NR 115.13.

(3) Nonconforming principal structures

C148: Forest County does not consider homes built legally under previous ordinance to be considered "nonconforming". We currently reserve this designation for uses in improper places, such as a tavern in a residential district. We place restriction on these previously legal buildings, but do not go so far as to label them nonconforming. This document solidifies a concept that up until now was our choice to define.
R: The term "nonconforming structure" was used to provide consistency and clarity. A county may use a different term for such structures, such as "legal, pre-existing structure," as long as the requirements of this section are satisfied.

C149: Neither current statutes nor current administrative rules require counties to regulate all nonconforming principal structures in the shoreland buffer area. Current law also does not prohibit counties from allowing structural alteration to nonconforming principal structures, nor does it allow structural alteration only if mitigation requirements are met. Finally, current law does not restrict the ability of counties to allow expansion or reconstruction of a nonconforming principal structure. Accordingly, this section of the proposed rule is a significant change from

current law and it places new restrictions on the ability of property owners to improve their property.

R: Consistent with Wisconsin common law, existing s. NR 115.05 (3)(intro.) and (e) requires counties to adopt some sort of regulation for nonconforming uses and nonconforming structures. If a county currently uses the 50% rule, structural alterations and expansions are limited to 50% of the equalized assessed value or fair market value of the structure. This proposal allows counties to remove the cap on costs, and allow reconstruction and limited expansion of nonconforming structures if certain standards are satisfied to limit the impact of nonconforming structures on water quality, wildlife habitat, and natural scenic beauty.

C150: Will the 50% rule be an option for counties to use to regulate nonconforming structures?

R: Yes – a county may chose to the use the 50% rule if it desires.

C151: The numerous uses of "may", rather than "shall" are positive.

R: This re-enforces that counties may be more restrictive.

C152: Is this language consistent with ch. NR 118?

R: We believe so.

C153: Is there statutory authority for the DNR to add specific requirements for the regulation of nonconforming structures to ch. NR 115?

R: Yes. The statutes require that the rule establish minimum standards.

C154: Is a roof overhang allowed when replacing a flat roof with a pitched roof, for counties that measure the ordinary high-water mark setback to roof overhangs? If so, how much of an overhang – 18" seems adequate?

R: The level of detail is not currently in the rule and would be left to county discretion.

C155: Is a reference to s. 59.692 (1s), Wis. Stats., required?

R: Please refer to response for Comment 147.

C156: Under reconstruction provision, can a pre-existing structure be reconstructed in a different location than it is currently located in? The rule needs to be clarified to make it clear that if an owner wants to reconstruct, but finds that the foundation must be replaced, that means that the building must be relocated to a conforming location if the original foundation was within 50 feet of the ordinary high-water mark.

R: To qualify for the replacement provision, the same footprint in the same location must be used. If the structure is moved, it must comply with all applicable standards (but it could be located with a reduced shoreland setback if the criteria for using the reduced setback formula are satisfied).

C157: Do statutes allow counties to prohibit the expansion of nonconforming structures if the "50% rule" is not applied?

R: Yes.

C158: To limit expansion to properties which do not have a compliant building location is far too punitive. There are structures that were built at a conforming location and due to erosion and/or to ice push are now less than 75 feet from the OHWM. If a structure is 50 feet or more back, this code should be more performance based. If an addition is on the roadside of the residence is this really a concern?

R: Expansion of structures extend the life of the structure and make it less likely that a property will eventually be brought into compliance with the ordinance, regardless of where the expansion is located. Expansion is provided as an option for parcels which do not have a compliant building location, to minimize the need for property owners to apply for variances.

C159: For paragraph (a), the definition of ordinary maintenance and repair conflicts with the definition in NR 115.03(37), particularly with respect to foundation issues.
R: Language was modified.

C160: By enumerating specific repairs that are included, are you excluding: painting? Siding? New storm windows? Gutters? Wouldn't it be better not to enumerate anything, or to say "includes, but is not limited to"?
R: Language follows Revisor of Statutes and Legislative Council Rules Clearinghouse guidelines.

C161: Paragraphs (c) and (d) are VERY confusing.
R: Language modified to provide clarity.

(4) Limitations on ordinary maintenance and repair, and additional limitations on structural alteration, expansion or reconstruction

C162: The purpose statement of NR 115 clearly explains that these rules are minimum standards and that counties have the ability to adopt more restrictive standards. Therefore, it is unnecessary to tell them this again with respect to regulating nonconforming structures. If the code includes this information with respect to nonconforming structures, then it should include this information after every other provision.
R: Language struck.

C163: The phrase "over the life of the structure" is not found in the statutes pertaining to nonconforming uses, nor do the statutes direct the counties on how to calculate the cost of the work. See Wis. Stat. §59.69 (10). Accordingly, we recommend that these provisions be omitted and that counties be allowed to retain the discretionary authority granted to them by the legislature in calculating the value of the structure used for a prohibited trade or new industry.
R: Please refer to response for Comment 149.

C164: This will create even more confusion. What, exactly does this accomplish?
R: Language modified to provide clarity.

(5) Conditional use permits

C165: The Wisconsin Legislature, not the DNR, has the authority to dictate when a county can issue a conditional use permit or the process they must follow. This provision should be deleted.
R: The provision does not require issuance of a conditional use permit, just notifies the county that they may use that permitting process if they so choose. The language was modified to clarify.

C166: What does this paragraph accomplish? It should be eliminated.
R: Please refer to response for Comment 165.

NR 115.21 Mitigation requirements

(1) Purpose

C167: Do the references to ch. Comm 83, Wis. Admin. Code, create confusion or does this guide property owners to the right place for information regarding private on-site wastewater treatment

systems? NR 115 is not the vehicle for requiring compliance with Comm 83. References to Comm 83 are not needed.

R: Language struck.

C168: Mitigation should apply to structures in the shoreland setback area, not the shoreland area. These regulations should not be applied to the entire shoreland area (i.e.; 300', 500', 900' from the OHWM).

R: Section is intended to provide standards for all principal structures in the shoreland zone. The impacts of development on shoreland areas do not stop at the first house, but extends all the way up a watershed.

C169: Where is the requirement for a buffer in this section? Isn't a buffer one of the key requirements for mitigation?

R: Preservation or establishment of the primary shoreland buffer is required under s. NR 115.21 (4)(b) when constructing or replacing a principal structure.

(2) General

C170: It is not clear whether this applies only to nonconforming structures or all structures. Please be clearer about when mitigation is required.

R: Language was modified to clarify.

C171: Mitigation requirements as permit conditions will be an enforcement nightmare for counties – this section needs serious revisions or should be removed from the rule.

R: If the provisions are not a condition of a permit, it is not clear how the provisions could be enforced. The Department will attempt to maximize voluntary compliance, and minimize the need for enforcement, by assisting counties to educate property owners about the reasons for the performance standards once the revisions to ch. NR 115 are finalized.

C172: This provision should include a general requirement that the mitigation may not be required, or a lesser mitigation measure may be required, if the cost of mitigation exceeds one-tenth (or similar fraction) of the cost of the proposed construction, reconstruction, expansion or structural alteration.

R: Monetary limits, such as the 50% rule, have been viewed by many as too complicated. The performance standards are tied to the type of project – expansion vs. construction/replacement – instead of cost.

C173: For condos and other multiple-unit developments, why is 300 feet used as the threshold? Why not make it 200 feet since a typical 20,000 square foot lot with 100 feet of frontage will be 200 feet deep? This is hopelessly complicated. Most property owners will be unable to understand it and perform the necessary calculations, which will likely result in a greater number of noncompliance cases. What does this accomplish?

R: 300 feet was used because it is cut-off for the shoreland zone on rivers.

C174: For condos and multiple-unit developments, I recommend that we stick with 300 feet. Condo and multiple-unit developments may very likely have deeper lots to meet square footage lot size requirements and also because condo developments frequently are on one large lot which is owned in common and which would likely be more than 200 feet deep.

R: Please refer to response for Comment 173.

C175: Is s. NR 115.21 (2)(b) clear enough that it applies to specified changes to a single dwelling unit?
R: Language was modified to clarify.

C176: Requiring the submission of a vegetative buffer plan will be a problem because the individual condo owner will have to obtain the approval of the entire condominium association before they can propose a change to their unit.
R: Because much of the area of a condominium development is used in common by all of the condominium unit owners, requiring agreement within the condominium association is the only practical way to address vegetative buffer issues. Obtaining the approval of the condominium association for a variety of different reasons is a responsibility assumed by buying a condominium unit.

C177: Section NR 115.21 (2)(b) 2. should be amended to provide that a new plan doesn't need to be submitted if the county has already approved of a comprehensive vegetative buffer plan for that same condominium property.
R: A county can handle that situation administratively.

(3) Accessory structures

C178: Much of the concern with the mitigation provisions for accessory structures stems from trying to fit accessory structures into the same mold as principal structures. Currently the mitigation requirements for non-principal structures in NR 115.21(3) are primarily construction limitations. Why not just place construction requirements on these structures as a condition rather than require mitigation under NR 115.21? This would eliminate unnecessary red tape of reporting, affidavits and monitoring, and provide the authorities protection sought by the rule. Why have file cabinets at the County office full of affidavits all saying: "build with natural materials and finish in an inconspicuous color." We would suggest that appropriate requirements simply be added as conditions for the accessory structures within NR 115.13(4).
R: Language was struck from this section and s. NR 115.19 was modified.

C179: This mitigation requirement appears to apply to the construction of any new accessory structure and alteration of any existing accessory structure (conforming or nonconforming) located within 1000 feet of the OHWM. A property owner should not have to agree to mitigation standards simply to build or improve a structure on his/her property.
R: Language struck.

C180: "Visually inconspicuous" is too vague and difficult to enforce. Isn't it unfair to prohibit visually conspicuous structures on the land when brightly colored boats and other structures are allowed on the water and the ice? Shouldn't the provision at least mention that the zoning administrator's decision as to what is "visually inconspicuous" can be appealed? It isn't clear whether "to be visually inconspicuous" modifies "screened with vegetation" or "constructed with natural materials"? The "visually inconspicuous" standard is problematic because it essentially prevents property owners from having a clear view of the water. People who purchase property near the water want to be able to see the water. Shouldn't "visually inconspicuous" guidelines similar to forestry's best management practices be developed?
R: "Filtered view" language was struck and a manual or other guidelines could be developed to aid counties and properties owners.

C181: Why is the variance process mentioned only in some sections of NR 115? Should the possibility of obtaining a variance be mentioned in every section? Why not add a cross-reference in all sections to a general variance provision in s. NR 115.23?
R: Variance language was added to other sections.

C182: I recommend the variance process leaving as is. There may be some, or many, things for which a variance is inappropriate - let's not imply an available loop-hole.
R: Statutory variance criteria are not changed by proposal.

C183: A definition of "natural materials" is needed. This phrase must be clearly defined to ensure consistency in how it is applied. "Natural materials" should be defined to include not only wood, rock or other naturally occurring products, but also materials designed to mimic them, like cement board or other synthetic wood products. Additionally, bricks and other materials, if of inconspicuous color, should be allowed. Finally, structures should be permitted if constructed of other materials as long as the parts that are viewable from the water are covered with "natural materials", like a cement retaining wall covered by a wood or stone veneer.
R: Language was modified to clarify.

C184: A definition of "natural materials" is needed. I recommend that it be defined as unpainted wood or stone and not as concrete or painted wood (staining to protect the wood acceptable). Roofing should be dark green, brown, or black and non-reflective.
R: Please refer to response for Comment 183.

(4) Principal structures

C185: This mitigation requirement appears to apply to the construction of any new principal structure and alteration of any existing principal structure (conforming or nonconforming) located within 1000 feet of the OHWM. A property owner should not have to agree to mitigation standards simply to build or improve a structure on his/her property.
R: Please refer to response for Comment 168.

C186: More subheadings may make this section easier to understand.
R: Subheadings were added.

C187: The Department should create a document similar to the Forestry Handbook rather than create rule language. The language should be removed from the rule to allow local flexibility with the assistance of a document that emulates the Forestry BMP handbook.
R: Please refer to response for Comment 180.

C188: In paragraph (b), subdivisions 2. and 3. are required by other laws and therefore should not be included here.
R: Language struck.

C189: Compliance with ch. Comm 83 is achieved when the sanitary permit is issued. Timing may make it difficult to complete the upgrading of the private onsite wastewater treatment system before the principal structure is constructed, expanded or reconstructed. Section NR 115.21 (4)(b) 2. should be amended to require that a permit for the private onsite wastewater treatment system must be issued before the principal structure is constructed, expanded or reconstructed.
R: Language struck.

C190: Control is required for 80% of the post-construction runoff, but 80% of what? A 100-year storm? A 25-year storm? It could require an expensive, professionally-drawn stormwater management plan. In most cases, compliance with BMPs should be sufficient.

R: Language was modified.

C191: Does s. NR 115.21 require a separate permit from the county for mitigation?

R: No - performance standards would be a condition of a permit to expand or construct/replace a structure.

C192: Do the requirements in this mitigation section mesh with the erosion control requirements of ch. NR 216?

R: Implementation of BMPs developed for chs. NR 151 and 216 would satisfy the water quality performance standard.

C193: Reasonable post-construction runoff requirements in the mitigation section may be appropriate, but they must be tied to easily identifiable erosion control measures. Requiring calculation of 80% of post-construction stormwater control for land disturbance less than an acre is unreasonable. The cost to hire an engineer to design and implement these measures is an unnecessary burden. We would propose to simplify this requirement as follows:

> 4. For projects that have a total land disturbance of less than one acre, the property owner shall~~:~~
>
> ~~a. D~~d~~evelop a site-specific stormwater management plan that incorporates one of the following measures: ~~to control at least 80% of the post-construction stormwater runoff resulting from impervious surfaces and implement and maintain the best management practices specified in the stormwater management plan. The stormwater management plan shall, to the maximum extent practicable, direct runoff from impervious surfaces onto pervious surfaces. Examples may include~~ directing downspouts onto lawns or rain gardens and away from pavement or driveways, and avoidance of piping or channelizing flow from impervious surfaces into waters of the state; or constructing a water quality improvement structure based on best management practices.
>
> ~~b. Submit documentation to the county from a registered professional engineer or landscape architect certifying that at least 80% of the stormwater runoff from impervious surfaces on the lot is controlled on-site and does not enter navigable waters or wetlands.~~
>
> Note: The department maintains a list of technical standards that it has determined adequate and effective for designing best management practices to control erosion and sediment runoff. Contact the department stormwater program in the Bureau of Watershed Management at (608) 267-7694 to obtain a copy of this list or visit the department's stormwater webpage at www.dnr.wi.gov/org/water/nps/stormwater.htm

R: Language was modified similar to suggestion.

C194: Why is the land disturbance acreage used as a threshold? It appears that runoff control should be required regardless of whether any land is disturbed, so why not get rid of the acreage distinction?

Shouldn't storm water runoff be required to be controlled if a nonconforming structure is reconstructed but no land disturbing activities are conducted?

R: Language struck.

C195: Can other suitably trained professionals submit documentation rather than just engineers or landscape architects?

R: For option 1, yes; for option 2, no.

C196: Instead of just saying "structure", why not repeat "principal structure" so it clear what is being talked about?

R: Language was modified to provide more clarity.

C197: What about the proposal to limit impervious surfaces to no more than 20% of the lot? It should be clarified that this section applies to the entire shoreland area. It should be the intent of this draft to limit impervious areas in the entire shoreland area.

R: To achieve the water quality performance standard, an impervious surface limit could be used.

C198: It is not clear that the mitigation section applies to all construction projects.

R: Language was modified to clarify.

C199: If a principal structure is being reconstructed closer than 50 feet from the OHWM, should some sort of buffer be required rather than just removing the nonconforming accessory structures? It seems this is when it is most advantageous to have a buffer. Why not require that one-half of the distance to the ordinary high-water mark must be preserved or restored?

R: Language was modified to require a buffer in all situations where a principal structure is being constructed or replaced.

C200: This section may be reasonable for new or re-construction, but is disproportionate for structural alterations. In exchange for replacing a door, for example, a property owner would be required to render his home "difficult to see" from the water. This could require significant landscaping, far in excess of the cost of the original project.

R: Structural alteration language was struck from this section.

(6) Mitigation documentation

C201: Rather than requiring property owners to record the affidavit, it may be easier to require the county to prepare the affidavit and record it, after the property owner has paid a fee, signed the affidavit and submitted it to the county.

R: Language struck.

C202: The affidavit is required to be recorded in 14 days – after what? The permit issuance? Completion of the project? When an affidavit is required it needs to be recorded prior to the issuance of a county permit.

R: Language struck.

NR 115.23 Adoption of administrative and enforcement provisions

C203: Many counties do not have "zoning administrators" or "planning and zoning committees". Perhaps reword to read "…the of appointment of zoning administrator or person with another title to perform the duties of…" For planning and zoning committees, just reference s. 59.69 (2), Wis. Stats.

R: Language modified similar to suggestion.

C204: Define what "new development" requires a permit. Does razing, burying or removing a structure require a permit? Do land disturbing activities require a permit? Does the construction of an "exempted" or "permissible" structure in the OHWM setback area require a permit?
R: Language modified in s. NR 115.13 and this section to clarify.

C205: Board findings of fact for variance and conditional use applications should clearly document how a project meets the applicable standards.
R: Wisconsin court decisions will dictate how detailed the findings of fact for board of adjustment or planning and zoning committee decisions must be.

C206: By adding language to the variance section that only allows the minimum relief necessary to avoid unnecessary hardship, is that creating a new standard beyond what the statutes allow? Can this be placed in an administrative code? Shouldn't it be included in a statute? A variance is a common zoning device, and thus does not require re-definition in the context of NR 115. Furthermore, this definition is not consistent with case law.
R: Language struck.

C207: For the lay person who is on a Board of Adjustment, the variance language provides good instruction (and also for the judge who may be ruling on an action taken by that Board).
R: The intent is to provide consistency and clarity in the application of variance criteria.

C208: How can DNR prohibit counties from using the special exception process instead of the variance process? This appears to be a statutory issue and should not be addressed in an administrative rule.
R: The statutes establish procedures and standards for conditional use permits and variances. However, the statutes do not authorize counties to use these two mechanisms interchangeable. Counties may only issue conditional use permits in shoreland areas if the standards in the county shoreland ordinance for such uses comply with the minimum shoreland zoning standards in ch. NR 115. If certain uses or activities are prohibited by ch. NR 115, or are only allowed if certain standards are complied with, the county shoreland zoning ordinance can only provide for a deviation from those standards by using the variance process. This proposal is re-iterating that a conditional use permit cannot be substituted for a variance where a variance is required.

C209: How long is a county required to keep a complete record of BOA and planning and zoning committee proceedings? What does the public records law require?
R: Language was modified to clarify that the public records law in ss. 19.21 to 19.39, Wis. Stats., applies.

C210: $1,000 maximum forfeiture seems too small. Some developers will look at small forfeitures as just a cost of doing business. When do forfeitures start to run? What if a violation cannot be abated in one day? Is a county required to continue fining if a good faith effort is being made to correct the violation?
R: This provision allows counties to provide for larger forfeitures if it chooses to do so. The subsection says "including at a minimum forfeitures of not less than $10 and not more than $1,000 per violation." In individual enforcement cases, the county prosecutor has the discretion to determine what forfeiture or restoration to seek.

C211: The provision that makes "each day of continued violation a separate offense" and subject to a fine between $10 and $1000 per offense is entirely unreasonable. This provision should be omitted.

R: Please refer to response for Comment 210.

C212: Should enforcement of violations include a requirement for restoration and compliance as well as forfeitures? What about an additional penalty for repeat offenders?

R: Please refer to response for Comment 210.

NR 115.25 Department duties

(4) Monitoring zoning decisions

C213: Does a state agency have the authority to seek court review of the decisions of boards of adjustments under s. 59.694 (10), Wis. Stats., and common law? Under what statute does the DNR claim to have the legal authority to "seek court review…under Wisconsin common law"?

R: Section 59.694 (10), Wis. Stats., allows the state to seek certiorari review. An example of common law review would be under public nuisance law. Section 87.30 (2), Wis. Stats., among other statutes, gives the state the authority to seek abatement of a public nuisance. Section 87.30 (2) can be applied to violations of county shoreland zoning ordinances in situations where the Department of Natural Resources has adopted a superseding ordinance amendment for a county. Language was clarified in this section to refer to certiorari review under s. 59.694 (10), Wis. Stats.

C214: Can "comment on" be added to the requirement that the department review decisions on granting conditional uses, variances and appeals? Could the department be prohibited from appealing a decision if they do not comment on it?

R: The statutes do not require aggrieved parties to comment on a decision in order to appeal it.

C215: The DNR should be required to provide written notice to a county if the DNR does not approve of a county's proposed shoreland zoning ordinance to avoid miscommunications between counties and the DNR, and to provide a legal safeguard if the DNR disagrees with an ordinance or actions related to an ordinance.

R: The Department comments on all amendments as staffing levels allows.

General Comments

C216: Label unused section numbers in ch. NR 115 as "Reserved."

R: Using the term "Reserved" would not be consistent with the rule drafting manual issued by the Revisor of Statutes and the Legislative Council Rules Clearinghouse.

C217: Standards in NR115 should be minimum standards – they provide a foundation from which counties can build and implement shoreland zoning ordinances.

R: Intent is to provide minimum standards with the ability for counties to go above and beyond the minimum standards.

C218: Counties are in the best position to determine what regulations are enforceable and if unenforceable provisions become part of the permanent NR115 rule, counties will be put in the precarious position because of increased liability and public expectations.

R: Input from counties on the enforceability of these provisions has been garnered throughout the process and the intent is not to create unenforceable provisions, but to make the revisions as easy as possible for counties to enforce and for property owners to understand.

C219: When possible, remove all language references that create aesthetic standards. Rather, work with counties to encourage the implementation of model ordinances at the county level, similar to the lighting issue. The issues addressed in the rule should be enforceable.

R: Language was modified to remove "filtered view" concept, but some standards were retained in order to meet statutory objective of preserving natural scenic beauty.

C220: If a provision is not enforceable, it should not be part of the rule.

R: Please refer to response for Comment 218.

C221: This draft has failed in its effort to reduce complexity – it would be significantly more complicated and harder to understand if this draft was promulgated.

R: Many provisions have been struck or clarified in third draft to resolve this problem.

C222: This rule does not provide adequate flexibility for local governments. If the DNR wants to "get out of the zoning business" and allow local governments to make zoning decisions within a broad DNR rule that protects and enhances the environments, this rule proposal does not accomplish that. In too many instances, this rule dictates zoning decisions that can and should be made locally.

R: Provisions have been reworded to provide counties with more flexibility than previously existed and in three cases, provisions have been proposed to allow counties to apply for approval to use other regulatory methods, which was not in previous versions. DNR is required by state statute to establish minimum standards for county shoreland zoning ordinances, so it cannot give counties complete flexibility.

C223: This rule package has several instances of restrictive provisions that apply up to 1000 feet from lakes. Some of these restrictions are rational, but some will be viewed as overreaching by the Department. The first step in solving this problem might be to clearly define what happens where by avoiding the use of phrases that are ambiguous to refer to the riparian area and the landward zones (the current rule uses the term "shoreland" in too many different contexts). The Department should then consider whether those regulations are necessary, or appropriate for this ordinance. For example, restrictions on land division under NR 115.09 seems to go beyond either ch. 236 or shoreland zoning authority.

R: The chapter is intended to provide standards for the shoreland zone as defined in the enabling statutes. The impacts of development on shoreland areas do not stop at the first house, but extends all the way up a watershed.

C224: Throughout this document, "parcel", "lot" and "property" seem to be used interchangeably. Please be consistent in their use.

R: Language was modified to provide more consistency.

C225: I would recommend leaving the purpose statements in each section, so that it's not lost sight of and so that the reader understands that these are not arbitrary or capricious requirements, but rather serve the purpose statement.

R: Please refer to the response for Comment 1.

C226: If a purpose statement is included in NR 115, only one statement should be included in the beginning of the rules, rather than creating different purpose statements for each individual provision in the rule.

R: Please refer to the response for Comment 1.

C227: The purpose statement related to "allowing property owners to have reasonable use of their property" is weak in comparison to the other purpose statements and thus is wholly inadequate. Protecting private property rights and preserving the ability of owners to use their property in a substantially similar manner as allowed under the prior code should be one of the primary objectives of these rules. Simply allowing property owners to have a reasonable use of their property suggests that it is acceptable take away the rights, further limit the uses, and devalue private property so long as the owner maintains some reasonable use. Such a standard is totally unacceptable. If we are going to apply such meaningless and watered-down language to the purpose statement regarding the protection of private property rights, we should apply the same language to the other purpose statements (e.g., provide for reasonable use of the waters by the public, fish and aquatic life; provide for reasonable stormwater runoff control; provide for reasonable protections for valuable wetlands).

R: Please refer to the response for Comment 1.

C228: Each page heading should include the Section number and Sub-section number so you don't have to page back for reference.

R: Good suggestions – will try to incorporate into future drafts. When the final version of ch. NR 115 is printed by the Revisor of Statutes, it will have subsection numbers at the top of each page.

C229: The proposed rules further erode the rights of property owners – From our association's standpoint, the primary objective of the proposed changes to NR 115 was to draft a rule that better protects both the environment and the rights of property owners. While the proposed rules seem to accomplish the first part of the objective, the rights of property owners have suffered. For example, property owners, under the current version of NR 115, are not prohibited from making ANY alterations to, additions to, or repairs of a nonconforming structure, even those in excess of 50% of the structure's assessed value. The current version of NR 115 simply allows (but does not require) counties to prohibit such activities in excess of 50% of the assessed value. In contrast, the proposed changes to NR 115 include many prohibitions on nonconforming structures, such as: (1) structural alterations to nonconforming structures unless mitigation standards are met; (2) all expansions of nonconforming structures located 50 feet or closer to the OHWM; (3) all expansions of nonconforming structures on lots less than 7,000 s.f.; (4) all expansions of nonconforming structures that have compliant building locations on the lot. These new prohibitions unreasonably restrict the ability of owners of nonconforming structures to improve and enhance their property and will make the regulatory environment with respect to nonconforming structures even more contentious.

R: Please refer to the response for Comment 149.

C230: The proposed rules contain many provisions that would be considered unreasonable restrictions on the ability of property owners to develop and improve their property including, but not limited to, new regulations pertaining to substandard lots in common ownership, the elimination of setback averaging (e.g., restricting the sale of such lots), restrictions on keyhole development, the regulations of property between 300 ft and 1000 ft from the OHWM, new restrictions on campgrounds, increasing minimum lot-size requirements, restricting the development of pre-existing substandard lots, and prohibiting routine activities in the primary buffer area (e.g., placement of open fences).

R: Some provisions have been removed from this draft, some provisions are in the existing rule and are not new provisions, and many of the new provisions are the result of requests made by counties and the public to establish standards for clarity and consistency.

C231: The proposed rules ignore the recommendations provided by the public. At the public listening sessions held from November – December 2003, the public identified three major objectives for the proposed re-write of NR 115 -- (1) keep the regulations simple; (2) make the regulations enforceable; and (3) provide communities with flexibility. As proposed, the draft rules fail to meet any of these objectives. With over 30 pages and 62 definitions, the proposed rules are anything but simple. Instead of being drafted as clear, easy-to-understand minimum standards, the proposed rules are overwritten, complex, and resemble a statewide zoning ordinance that attempts to regulate every aspect of zoning and land divisions in shoreland areas. With new standards for PUDs, land divisions, campgrounds, signs, color of structures, vegetative buffers, densities, walkways, fencing, setback reductions, viewing access corridors, land disturbing activities, nonconforming structures, and numerous other activities, the proposed rules strip away most of the flexibility that counties had to regulate shoreland areas. The proposed changes to NR 115 also eliminate flexible tools such as setback averaging and attempt to steer county zoning regulations in a particular direction by "encouraging" counties to adopt more restrictive standards. Finally, the proposed rules also ignore various specific recommendations by the public such as the preference for a 35-foot primary buffer.

R: The third draft has been slimmed down considerably, but to provide consistency and clarity, the text has increased. Since this is not the final draft, we welcome further suggestions to improve the rule draft to meet shoreland zoning objectives and also provide simplicity, enforceability, and flexibility for counties and property owners.

C232: The proposed rules do not represent a consensus from the Advisory Group. Many of the proposed changes have not been adequately discussed or voted upon by the Advisory Group. The Advisory Group meetings have focused more on reading through the rule, than discussing the merits of various provisions. When Advisory Group members raise concerns at meetings, very little effort is made to reach consensus or to get a clear understanding how the entire group feels about a particular provision. Without more discussion on these provisions, the DNR should not assume that a majority of Advisory Group members support the proposed changes. We strongly encourage the DNR to seek consensus form the Advisory Group as much as possible prior to holding public hearings.

R: We would like to reach consensus on as many issues as possible; however, we also recognize that the Advisory Committee members will be unlikely to reach consensus on all matters. We have extended the timeline for the revision in order to allow more time to work with Advisory Committee members.

C233: The general text of the document, in effect, removes control of the shoreland area out of the County's jurisdiction to the DNR. Small insertions of the word "shall" put great responsibility on counties to perform or be corrected and leaves the Zoning and Variance boards little more than office staff for the Department.

R: The rule establishes minimum standards to achieve the statutory shoreland zoning objectives. It does not change statutory variance criteria. Counties retain administrative authority to administer their ordinances. Careful consideration has been placed on when the term "shall" is used.